

UNITED STATES OF AMERICA,	)	IN THE COURT OF MILITARY
Appellant	)	COMMISSION REVIEW
	)	APPELLEE’S MOTION FOR ADDITIONAL
	)	JUDICIAL DISCLOSURES CONCERNING
	)	<i>EX PARTE</i> COMMUNICATIONS WITH
	)	COUNSEL FOR APPELLANT
)	
	)	CASE No. 07-001
v.)	
)	
	)	Hearing Held ¹ at Guantanamo Bay, Cuba on 4
	)	June 2007
	)	Before a Military Commission
OMAR AHMED KHADR,	)	Convened by MCCO # 07-02
Appellee	)	Presiding Military Judge
	)	Colonel Peter E. Brownback III
)	

**TO THE HONORABLE, THE JUDGES OF THE COURT OF MILITARY
COMMISSION REVIEW**

Relief Sought

Omar Khadr (“Appellee”) respectfully requests that this Court make additional judicial disclosures concerning apparent *ex parte* contacts between court personnel and non-court personnel employed by the United States, including lawyers for the United States (“Appellant”). Specifically, Appellee seeks disclosure of the email that contained the Deputy Secretary of Defense’s purported approval of the Court of Military Commission Review Rules of Practice, dated 9 August 2007, and any other communications between court and non-court personnel relating to that “approval” or any other attempted subsequent remedial measures Appellant took in response to the issues Appellee raised with respect to the Court’s Rules of Practice being void, either orally or in writing.

¹ Appellee has yet to be arraigned.

Facts

On 7 August 2007, Appellee moved to dismiss Appellant's appeal based on, *inter alia*, Appellant's failure to file its appeal in accordance with the rules of the Court of Military Commission Review ("CMCR") (as required by R.M.C. 908(c)(11)) because no such rules then existed. In an apparent attempt to remedy the defect, the Deputy General Counsel for the Department of Defense, Mr. Daniel Dell'Orto, forwarded a copy of the CMCR rules previously issued under color of the authority of the "Deputy Chief Judge" to the Deputy Secretary of Defense for "review and approval."² (See Attachment A.) Thereafter, on 13 August 2007, the Deputy Clerk of Court, Mark Harvey, sent an email to the parties stating, "I received a copy of the attached approval of the CMCR Rules of Practice today," and am attaching a copy of the purported approval and a copy of the Rules. (See Attachment B.) The email does not indicate from whom Mr. Harvey, a member of the staff of this Court, received the approval document.

Argument

This Court should disclose from whom the Court received the purported approval, and should disclose the content of all communications regarding the approval.

The Court should disclose the content of *ex parte* communications. See, e.g., *United States v. Martinez*, 40 M.J. 82 (C.M.A. 1994). Moreover, in the course of this litigation, this Court has itself acknowledged the propriety of disclosing information relating to communications of this type. The Court initiated the practice by disclosing *sua sponte* the fact of Captain Rolph's contact with an OGC attorney, in which Captain Rolph questioned the validity of appointments to the Court made by the Deputy Secretary of Defense. (See Disclosure

² Inexplicably, notwithstanding the Action Memo's indication that it would be "prudent for the *Secretary of Defense* to memorialize his review and approval (emphasis added)" of the court rules, the approval was, as with other questionable approvals in this litigation, executed by the *Deputy* Secretary, Gordon England.

Concerning Motion to Abate and Motion to Attach Documents, dated 23 July 2007.) The Court then granted Appellee's request for additional disclosure relating to these contacts, to include production of the text of emails between Captain Rolph and OGC attorney, Paul Ney, in which Mr. Ney communicated, *inter alia*, the Appellant's legal position on why the appointments were proper. (See Ruling on Request for Additional Judicial Disclosure, dated 30 July 2007.)

Appellant has followed the Court's lead. Appellant saved the Court the trouble of granting Appellee's motion to compel production of documents relating to Captain Rolph's alleged contacts with military commission prosecutors. It provided the documents without opposition. Thus, the Court and Appellant have implicitly acknowledged that the nature and extent of such contacts must be fully disclosed to the parties so as to provide an adequate opportunity to "explore the impact" of the communications and to develop an appropriate record for review. See *Martinez*, 40 M.J. at 83. Moreover, disclosure is necessary to prevent Appellee from being placed at an unfair disadvantage vis-à-vis counsel for Appellant, who have knowledge of the substance of these contacts.

Mr. Harvey's email does not reveal the source of the approval document. Appellee believes that a possible, if not likely, source of that document would be the Office of the General Counsel for the Secretary of Defense ("OGC"). Lawyers who work for OGC are, of course, counsel for a party to this proceeding, and any communications between attorneys in that office and this Court constitute *ex parte* communications. For the reasons discussed above, Appellee has a right to discover the content of any such communications.

Conclusion

For the foregoing reasons, this Court should disclose from whom Mr. Harvey (or other court personnel) received the purported approval of the Court's rules and any email or other writing accompanying the transmission.

ATTACHMENTS


A) Action Memo from Mr. Daniel Dell'Orto, dated 1 August 2007

B) Mr. Mark Harvey e-mail, dated 13 August 2007

Respectfully submitted,

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FAX: 202-761-0510

PANEL No. _____
GRANTED (signature) _____
DENIED (signature) _____
DATE _____

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was emailed to this Court; Major Jeffrey D. Groharing, USMC; Captain Keith A. Petty, JA, USA; and Lieutenant Clayton Trivett, Jr., JAGC, USN on 20 August 2007.


William C. Kuebler
LCDR, JAGC, USN
Detailed Appellate Defense Counsel

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**TO THE HONORABLE, THE JUDGES OF THE COURT OF MILITARY
COMMISSION REVIEW**

Relief Sought

COMES NOW Mr. Omar Khadr (“Appellee”) and respectfully requests that this Court attach the following documents to Appellee’s Motion for Additional Judicial Disclosures filed concurrently herewith:

A) Action Memo from Mr. Daniel Dell’Orto, dated 1 August 2007

B) Mr. Mark Harvey e-mail, dated 13 August 2007

These documents are necessary to support the factual basis for Appellee’s Motion for Additional Judicial Disclosures. Therefore, this Court should grant Appellee’s motion.

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¹ Appellee has yet to be arraigned.

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202-761-0133 ext. 116
FAX: 202-761-0510

PANEL No. _____
GRANTED (signature) _____
DENIED (signature) _____
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was emailed to this Court; Major Jeffrey D. Groharing, USMC; Captain Keith A. Petty, JA, USA; and Lieutenant Clayton Trivett, Jr., JAGC, USN on 20 August 2007.



William Kuebler
LCDR, JAGC, USN
Detailed Appellate Defense Counsel

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0811



GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
1600 DEFENSE PENTAGON
WASHINGTON, D. C. 20301-1600

8/6

DEPSECDEF
GE APPROVES
AUG 09 2007
HAS SEEN

AUG 01 2007

DSD Action _____

FOR: SECRETARY OF DEFENSE

FROM: William J. Haynes II

[Signature], Acting

SUBJECT: Court of Military Commission Review ("CMCR") Rules of Practice

- Paragraph 25-3 of the Regulation for Trial by Military Commission states, "[t]he Chief Judge of the CMCR, in consultation with other members of the CMCR, shall issue operating guidelines for the CMCR consistent with the M.C.A., the M.M.C., and this Regulation."
- Acting pursuant to his authority to prescribe the CMCR's procedures and in consultation with the other CMCR appellate military judges, Deputy Chief Judge John W. Rolph issued guidelines, known as the Court of Military Commission Review Rules of Practice (TAB A), effective on June 27, 2007.
- It is prudent for the Secretary of Defense to memorialize his review and approval of the Court of Military Commission Review Rules of Practice, which prescribe procedures for appellate review by the CMCR.

RECOMMENDATION: Approve the Court of Military Commission Review Rules of Practice prescribed on June 27, 2007.

Approve *[Signature]* Disapprove _____ Other _____

Attachments:
As stated

SD CA		DSD SA	<i>[Signature]</i> 8/1/07
SD SMA		DSD SMA	<i>[Signature]</i> 8/1/07
SD MA		DSD MA	<i>[Signature]</i> 8/1/07
TSA		DSD MA	<i>[Signature]</i> 8/1/07
STF DIR		DSD MA	<i>[Signature]</i> 8/1/07
ES	<i>[Signature]</i> 8/2/07	ESD	<i>[Signature]</i> 8/2/07
ESR MA	<i>[Signature]</i> 8/2/07		

Attachment A

OSD 12520-07



8/2/2007 2:50:03 PM

Kuebler, William, LCDR, DoD OGC

From: Harvey, Mark Mr DoD OGC
Sent: Monday, August 13, 2007 3:03 PM
To: Kuebler, William, LCDR, DoD OGC; Groharing, Jeff, Maj, DoD OGC
Cc: [REDACTED]

Subject: RE: Khadr -- Appellee Motion to Compel and Motion to Attach

Attachments: CMCR Rules of Practice Approved (Aug 9).pdf



CMCR Rules of
Practice Approve...

I received a copy of the attached approval of the CMCR Rules of Practice today.

Regards,

Mark Harvey
Deputy Clerk, USCMCR